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October 9, 2002

The Honorable Billy Tauzin  
House Committee on Energy  
and Commerce  
2125 RHOB  
Washington, DC 20515-6115

The Honorable Jeff Bingaman  
Senate Committee on Energy  
and Natural Resources  
SD-364 DSOB  
Washington, DC 20510-6150

Dear Chairmen Tauzin and Bingaman:

As you wrap up your efforts to complete an electricity title for inclusion in the conference report to H.R. 4, we urge you to adopt a provision that gives strong guidance to FERC in regard to its Notice of Proposed Rulemaking on Standard Market Design (SMD). We have reviewed the latest proposals, including the October 7<sup>th</sup> proposed Senate counteroffer, and find that they do not adequately address our concerns about the SMD NOPR.

The Western Governors strongly advocate a regional approach to regulation of electricity markets, and we have communicated our position to Congress and to the Commission on numerous occasions. Unfortunately, Section 211 of the October 7<sup>th</sup> proposal does not require the Commission to follow this approach, and conversely, appears to allow the Commission to proceed to implement SMD on a nationwide basis without adequately taking into account regional impacts. We have attached a copy of Section 211 of the October 7<sup>th</sup> Proposed Senate Counteroffer, and have underlined proposed changes.

Our specific concerns are as follows:

\$ The proposal requires the Commission to hold public hearings in various regions of the country, but does not require the Commission to find that the final order will benefit all regions of the country. Therefore, the Commission could proceed with the rule even though there are significant detrimental impacts to one or more regions. This could result in one region of the country benefitting at the expense of all others.

\$ The "substantial evidence" standard is too low a hurdle for such a sweeping policy proposal. The Commission should at least be required to find that the evidence in favor of moving forward outweighs evidence to the contrary. Congress should at the very least, therefore, impose a "preponderance of the evidence" standard.

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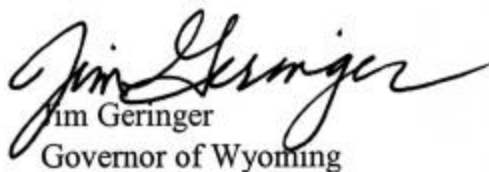
\$ The proposal requires the Commission to determine whether its rule will “impair the ability of any State regulatory authority to protect the interests of electric consumers, investors, or the public”. State regulatory agencies have historically been the primary protectors of the State’s citizens. FERC’s record in this regard is spotty at best. In weighing evidence under this subsection, the Commission should be required to give great weight to the testimony of State regulatory officials.

\$ The proposal prevents any final rule from taking effect until the expiration of 120 calendar days after notice of the final rule is published in the Federal Register. On such an important issue of national policy, 120 calendar days may be an insufficient time period for Congress to adequately review the rule. We recommend that the language be changed to prevent the rule from taking effect until the expiration of 120 days on which the House of Representatives of the United States and the United States Senate are each in session following its publication in the Federal Register.

\$ The proposal could be construed as a codification of the Commission’s authority to proceed with the SMD rule. It is at least arguable that the Commission has exceeded its authority under current law. We recommend that a savings clause be added to ensure that entities that wish to challenge the rule on that basis are not precluded from doing so due to Congress’ adoption of this provision.

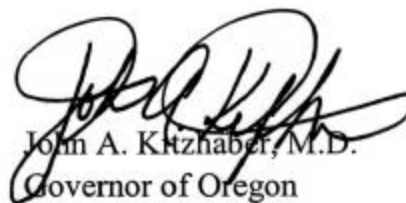
Western Governors appreciate your efforts to date in crafting a national energy policy. Thank you for your attention to this important matter.

Sincerely,



Jim Geringer  
Governor of Wyoming

Lead Governor for Energy



John A. Kitzhaber, M.D.  
Governor of Oregon

Lead Governor for Energy

cc: Energy Conferees

Attachment

## SEC. 211. STANDARD MARKET DESIGN RULEMAKING.

(a) RECONSIDERATION. — Before issuing any final rule or order based on the notice of proposed rulemaking captioned Remediating Undue Discrimination through Open Access Transmission Service and Standard Market Design, the Federal Energy Regulatory Commission shall –

(1) review and reconsider the proposed rule in light of the provisions of this Act and make such changes as may be necessary;

(2) publish in the Federal Register a notice of the revised proposed rule or of the Commission's intent to adopt the original proposal;

(3) hold public hearings in all regions of the country affected by the proposed rule; and

(4) find, based on a preponderance of the evidence, that, as to each region of the country affected by the proposed rulemaking, the final order –

(A) will have beneficial effects on the price and supply of electricity;

(B) will not adversely affect the safe, reliable and secure operation of generation and transmission facilities;

(C) will not discourage the construction of generation and transmission facilities;

(D) will not impair the ability of the Tennessee Valley Authority, the Bonneville Power Administration and other Federal power marketing administrations to meet its statutory requirements; and

(E) will not impair the ability of any State regulatory authority to protect the interests of customers, investors and the public. In weighing evidence on this point, the Commission shall give great weight to the testimony of affected State regulatory officials.

(c) CONGRESSIONAL REVIEW.--Any order issued by the Commission pursuant to its notice of proposed rulemaking shall not take effect until the expiration of 120 days on which the House of Representatives of the United States and the United States Senate are each in session following its publication in the Federal Register.

(d) DEFERENCE TO REGIONAL ADVISORY BODY - No rule issued by the Commission pursuant to its notice of proposed rulemaking shall take effect or continue in effect in any region that has requested the Commission to establish a Regional Advisory Body pursuant to section 215(j) unless the Regional Advisory Body has made a recommendation to the Commission to adopt the rule for application within the region.

(e) Nothing in this section shall be construed to extend the authority of the Federal Energy Regulatory Commission under the Federal Power Act or affect the right of any party to assert the lawfulness or unlawfulness of the proposed rulemaking referred to in subsection (a).